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In the

Supreme Court of the United States

LAKHDAR BOUMEDIENE, ET AL.,
PETITIONERS
v.
GEORGE W. BUSH, ET AL.,
RESPONDENTS.

KHALED AL ODAH, ET AL.,
PETITIONERS,
v.
UNITED STATES, ET AL.,
RESPONDENTS.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF SALIM HAMDAN AS *AMICUS CURIAE*

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INTEREST OF *AMICUS CURIAE*[1]

Salim Ahmed Hamdan, the Petitioner in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), has been detained along with the Petitioners in *Boumediene* and *Al Odah* (collectively, "*Boumediene*"), at the Guantanamo Bay Naval Base and deemed an "enemy combatant." However, Hamdan has additionally been charged with "Conspiracy" and "Providing Material Support for Terrorism" and slated for trial before a military commission. Hamdan submits this *amicus curiae* brief to explain why he and others charged before military commissions are on a different footing than those detained and why he and others similarly situated must have access to the writ of *habeas corpus* to challenge those proceedings on a pre-trial basis. Due to the interrelationship of this issue with the questions presented in *Boumediene*, Hamdan has asked this Court to grant his Petition for Certiorari Before Judgment. At a minimum, Hamdan asks this Court to render a decision in *Boumediene* that makes clear that he and others facing trial by a commission retain the right to pre-trial habeas found in Hamdan's previous case before this Court.

In *Hamdan v. Rumsfeld*, this Court ruled that Hamdan could not be tried by military commission because his trial violated both the Uniform Code of Military Justice and the Geneva Conventions. This Court held that both sources of law protected Hamdan and enforced these protections against the respondents, which included the Secretary of Defense and the President. On remand from this Court, the district court interpreted section 7 of the intervening Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (the "MCA"), to require dismissal of Hamdan's habeas petition. Hamdan's appeal from the district court's decision is pending in the D.C. Circuit. The Circuit Court has issued an order staying *en banc* consideration of Hamdan's case pending this Court's decision in *Boumediene*. *See Hamdan v.*

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[1] In accordance with the Court's Rule 37, Hamdan has received written consent of counsel for all parties to file this brief as *amicus curiae*. The Consents have been or will be filed with the clerk. No counsel for a party authored this brief in whole or in part or made monetary contribution to the preparation or submission of this brief.

Gates, No. 07-5042 (D.C. Cir. July 24, 2007) (per curiam order). Hamdan and the approximately 75 detainees that the Government currently intends to try in commissions therefore have the most profound interests in the outcome of this case.

SUMMARY OF ARGUMENT

The questions presented by *Boumediene* implicate some of the same issues Hamdan has raised in his habeas petition. Specifically, both cases question whether the MCA's jurisdiction-stripping provision applies retroactively to habeas petitions pending at the time of passage. Moreover, both challenge the Government's position that neither Petitioners nor Hamdan are entitled to the protection of the Suspension Clause and constitutional habeas because of their status as alleged alien enemies held outside of the United States.

There is, however, a fundamental distinction between the cases currently before this Court and Hamdan's pending case before the court of appeals. While the *Boumediene* Petitioners challenge their indefinite detention and the CSRT procedures used by the Government to justify that detention, Hamdan raises a pre-trial challenge to the legality of the military commission slated to try him for alleged war crimes.[2]

Although Hamdan agrees with Petitioners' argument that the territorial ambit of the Great Writ reaches those detained at Guantanamo, he submits this *amicus* brief to explain how his case differs from those currently before the Court and why this Court should resolve *Boumediene* in a manner that protects Hamdan's pre-trial access, and that of other commission defendants, to the writ. Because the questions in *Boumediene* are so closely related to those raised by Hamdan, he has asked this Court to grant his petition for a Writ of Certiorari Before Judgment and consider these cases together. Pet. Cert. Before J., *Hamdan v. Gates* (No. 07-15) (filed July 2, 2007).

As explained below, the habeas right to challenge an unlawful trial is included within the right to challenge executive detention.

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[2] *Al Odah* petitioner Omar Khadr has been charged under the MCA, but the *Al Odah* and *Boumediene* appeals concentrate on the legitimacy of the CSRTs as a basis for non-commission Petitioners' continuing detention.

Moreover, the MCA and the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 ("DTA") appear to allow for a far more limited judicial review of commissions than CSRTs. Accordingly, if this Court does not grant Hamdan's Petition for Certiorari Before Judgment, then he respectfully asks that this Court use *Boumediene* to make clear that if Petitioners have access to the Great Writ then, *a fortiori*, so too does Hamdan and any other defendant facing trial and punishment by a novel and untested military commission. Indeed, the Government has conceded as much. *See* Br. for Respondents in Opposition to Cert., *Hamdan v. Gates*, No. 07-15, at 12 ("If this Court holds in *Boumediene* and *Al Odah* that enemy combatants at Guantanamo Bay may petition for *habeas corpus* . . . there is no reason to suppose that its holding would not apply to those enemy combatants who have been designated for trial by military commission.").

Should the Court conclude, however, that the *Boumediene* Petitioners do not now have access to the writ, Hamdan asks that the Court make clear that the ruling does not prejudice his separate appeal arguing for the right to bring a pre-trial challenge to the military commissions based on the fact that such challenges lie at the core of traditional habeas jurisprudence and that the MCA fails to provide an adequate alternative for habeas review of the commissions.

ARGUMENT

I. Military Commission Challenges Under the Great Writ Differ Significantly from Detention Challenges

The challenge brought by Hamdan differs in important respects from the challenges brought by Petitioners to their detention. First, while each challenges a portion of the statutory framework established by the MCA and the DTA, the cases implicate different statutory provisions and legal concepts. Thus, while the analytical framework surrounding the Suspension Clause claims in each case is similar, the legal analysis will necessarily diverge. Moreover, the well-recognized conceptual difference between detention on the one hand, and criminal prosecution and punishment on the other hand, distinguishes the two challenges

and suggests that, whatever the scope of habeas may be to challenge detention, challenges to commissions present a far simpler case for this Court to resolve.

A. The Instant Case and Hamdan's Case Implicate Different Statutes and Require Separate Analyses

Once aliens are detained at Guantanamo, they are subject to the Combatant Status Review Tribunal ("CSRT") process that was put into effect after this Court's decision in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). Because Petitioners here seek the writ of *habeas corpus* on the grounds that their indefinite detention without charge is unlawful, *Boumediene* Cert. Pet. at 6, the CSRT procedures are the focus of their argument. Putting aside their arguments on the retroactivity of the MCA and the geographical reach of habeas, Petitioners' Suspension Clause argument focuses on the legal aspects of *detention*. Accordingly, Petitioners argue that the CSRT process and the attendant review procedures set forth in section 1005(e)(2) of the DTA are an insufficient substitute for robust habeas review. *Boumediene* Pet. at 18-21.

By contrast, Hamdan challenges the legality and jurisdiction of the military commission set to try him for offenses under the laws of war. Thus, while Petitioners challenge the part of the DTA/MCA scheme dealing with indefinite detention, Hamdan challenges the second part of that legislative framework, the authorization of a military commission process to try and convict non-citizen detainees. In explaining why the CSRT procedures were an inadequate substitute for habeas review of detention in this very case, Judge Rogers recognized this operative distinction and noted that the answer to the question may depend on whether the petitioners were challenging only their detention or were facing "imminent trial." *Boumediene v. Bush*, 476 F.3d 981, 1005 (D.C. Cir. 2007) (Rogers, J., dissenting).

Under the MCA, alien detainees designated as "unlawful enemy combatants" by a CSRT may be subject to trial by commission. If the Government does choose to prosecute, the CSRT determination as to "unlawful enemy combatant" status is "dispositive for purposes of jurisdiction for trial by military commission." MCA § 3(a) (adding 10 U.S.C. § 948(c), (d)). The

MCA likewise only allows for narrow, *post hoc* review of commission final decisions by the D.C. Circuit, which can only consider "whether the final decision was consistent with the standards and procedures specified" by the MCA, not whether those standards and procedures are consistent with federal law and the Constitution. MCA § 3(a) (adding 10 U.S.C. § 950(g)). The MCA makes no provision for challenging whether the commission's procedures themselves are legal. Nor is there provision for review of factual conclusions; rather, "the Court of Appeals may act only with respect to matters of law." *Id.* Thus, *Boumediene*'s review of DTA section 1005(e)(2) will not answer the question of whether MCA section 3 provides a sufficient substitute for a habeas challenge to the legality of the military commissions.

B. Individuals Charged Before Commissions Have a Stronger Case for Habeas Than Those Being Detained

This Court and others have long distinguished between individuals objecting to detention and those challenging trials by untested military commissions. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2798 (2006) ("Hamdan does not challenge, and we do not today address, the Government's power to detain him"); *id.* at 2817 (Scalia, J., dissenting) ("The vast majority of pending petitions, no doubt, do not relate to military commissions at all, but to more commonly challenged aspects of 'detention' such as the terms and conditions of confinement."); *see In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 447 n.7 (D.D.C. 2005) (distinguishing between the "legality of military commission proceedings" and "the rights of detainees with respect to their classifications as 'enemy combatants'"), *overruled by Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007). The Government has also recognized the long line of cases from this Court holding that "special procedural protections often attach to individuals, including suspected offenders, only after they are accused" of a crime. Draft Memorandum from Assistant Attorney General Jack Goldsmith to Alberto Gonzales, (Mar. 19, 2004), in *The Torture Papers* 379 (Karen J. Greenberg & Joshua L. Dratel eds.) (citing U.S. Const. amend. VI; *United States v. Ash*, 413 U.S. 300, 321

(1973) (Stewart, J., concurring); *United States v. Gouveia*, 467 U.S. 180, 189 (1984); and *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)). And the Government agrees that this "distinction between those who are and are not accused makes eminent sense." *Id.* Indeed, in this very case the Government has implicitly acknowledged that trial and punishment by a military commission give rise to greater rights of judicial review than detention alone. *See* Br. for the Respondents in Opposition to Cert., *Boumediene v. Bush*, No. 06-1195, at 13.[3]

Because trial by commission raises more serious concerns than even indefinite detention for at least four reasons, individuals subject to the former have an even stronger case for habeas review than those facing the latter.

First, whereas detention is a military function that serves national security goals, punishment is a judicial function that serves the goals of justice. The Government has repeatedly argued that this Court must defer to the President on matters of detention because detention serves military purposes. *See, e.g.*, Br. of Respondent at 4, *Rasul v. Bush*, 542 U.S. 466 (2004) ("[D]etention serves the vital military objectives of preventing captured combatants from rejoining the conflict and gathering intelligence to further the overall war effort and prevent additional attacks."); Br. of Respondent at 15, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) ("The detention of captured enemy combatants serves vital military objectives. First, detention prevents enemy combatants from rejoining the enemy and continuing to fight against America and its allies.") (citations omitted). The Government has, in fact, gone to great lengths to distinguish detention from punishment – which is not a military but a judicial function. *See id.* at 15-16 ("The detention of captured combatants during an ongoing armed

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[3] *See also Hamdi*, 542 U.S. at 593 (Thomas, J., dissenting) (drawing the "punishment-nonpunishment distinction"); *Amicus* Br. of the Military Attorneys Assigned to the Def. in the Office of Military Commissions, *Al Odah*, No. 03-343, at 5-7; *Yamashita*, 327 U.S. at 30 (Murphy, J. dissenting) ("[T]he obnoxious doctrine asserted by the Government in this case, to the effect that restraints of liberty resulting from military trials of war criminals are political matters completely outside the arena of judicial review, has been rejected fully and unquestionably.").

conflict is neither a punishment nor an act of vengeance, but rather a simple war measure.") (citations omitted); *id.* at 16 n.5 ("[T]he detention of enemy combatants has not historically been regarded as a punishment and is not designed to promote the traditional aims of punishment.") (citations omitted).

While the President may seek this Court's deference on "simple war measures" related to "vital military objectives," such deference is not warranted for punishment. This Court, not the military, has particular expertise when it comes to "promot[ing] the traditional aims of punishment," and this Court, not the military, is entitled to deference on such matters.

Second, individuals tried by a military commission face the most severe possible punishments of life imprisonment or death. In contrast, individuals who are merely detained and who have not been tried by a military commission *must be released* at the end of the "particular conflict in which they were captured." *Hamdi*, 542 U.S. at 518, 521 (plurality); *see also In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946). Moreover, many persons detained as enemy combatants at Guantanamo have been released and repatriated to their own countries, even while the particular conflicts in which they were allegedly captured are ongoing. *See* Press Release, Department of Defense, *Detainee Transfer Announced* (June 19, 2007) ("Since 2002, approximately 405 detainees have departed Guantanamo for other countries"), *available at* http://www.defenselink.mil/releases/release.aspx?releaseid=11030. Because individuals who are tried by commissions face no such prospect of freedom, they should have access to the Great Writ to test those trials.

Third, a successful habeas challenge to commissions cannot in any way endanger national security. After a successful challenge to a commission trial, the petitioner remains a detainee at Guantanamo. By contrast, the Government must release from military custody a petitioner who brings a successful habeas challenge to his detention. The Government cannot, and therefore does not, cite a single national security rationale for denying Hamdan the habeas right to challenge the jurisdiction of military commissions. Thus, when faced with habeas challenges to commissions, the Court need not balance interests as it must when

confronted with a challenge to detention. *Compare Hamdi*, 542 U.S. at 524 (plurality) (applying a due process balancing test for detention) *with Gosa v. Mayden*, 413 U.S. 665, 689 n.5 (1973) (Douglas, J., concurring) (noting that habeas has been historically used to test the jurisdiction of tribunals to try defendants); *and Fay v. Noia*, 372 U.S. 391, 423 (1963) ("It is of the historical essence of *habeas corpus* that it lies to test proceedings so fundamentally lawless that imprisonment pursuant to them is not merely erroneous but void."), *overruled in part on other grounds by Wainwright v. Sykes*, 433 U.S. 72 (1977).

Fourth, the *Boumediene* Petitioners have argued previously that those facing commissions have a weaker case for habeas review because the commissions at least offer some form of process. *See, e.g.*, Supp. Br. of Pet'rs Boumediene, et al., and Khalid, *Boumediene v. Bush*, No. 05-5062, at 18 (D.C. Cir.); Guantanamo Detainees' Supp. Br., *Al Odah v. United States*, No. 05-5064, at 13. In reality, however, those facing commission procedures are in a far worse position than those merely being detained. If convicted, they face the ultimate penalties of life imprisonment or death. And even if acquitted by a commission, the MCA does not require that they be released. Instead, an acquitted commission defendant would simply be returned to detention at Guantanamo and face the same fate as the *Boumediene* Petitioners.

II. The Writ of *Habeas Corpus* Must Be Available to Challenge Military Commissions on a Pre-trial Basis

Amicus believes that all persons subject to detention at Guantanamo have access to the Great Writ. This is especially so for those facing novel and untested military commissions, which have traditionally been at the core of habeas jurisprudence. In this area of *criminal* enforcement and punishment, the Court's institutional competence is at its zenith, and the harmful consequences of the writ being granted (if any) are at their nadir. Moreover, the military commissions purport to have the power to sentence individuals to death. In this situation, where those seeking habeas are threatened with the Government's ultimate sanction, habeas review is all the more necessary.

A. The Great Writ Has Historically Been Available to Challenge the Jurisdiction and Constitutionality of Military Tribunals

This Court has repeatedly held that the legality of military commissions may be tested in federal court through the writ of *habeas corpus*. For example, in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 118 (1866), this Court exercised jurisdiction over *Milligan*'s habeas petition to answer the question of whether the military tribunal in that case had "the legal power and authority to try and punish" the defendant. That this Court found the military commission to be unlawful in *Milligan* is less important for present purposes than the fact that it clearly understood the writ of *habeas corpus* to be available to challenge military trials.

The same has been true in the case of American servicemen, where this Court has long held that the lawfulness of tribunals can be challenged on habeas. *See United States v. Grimley*, 137 U.S. 147, 150 (1890) ("It cannot be doubted that the civil courts may in any case inquire into the jurisdiction of a court-martial, and . . . may discharge [the defendant] from the sentence."). Habeas is permissible to examine whether the tribunal: (1) is legally constituted; (2) has personal jurisdiction over the accused; and (3) has subject-matter jurisdiction to hear the offense charged. *Hiatt v. Brown*, 339 U.S. 103, 111 (1950); *see also Gusik v. Schilder*, 340 U.S. 128 (1950) (recognizing the availability of habeas to challenge the jurisdiction of a court-martial).

In the case of alleged alien enemies, the Court has likewise allowed military commission defendants to test the legality of the process through *habeas corpus*. *Ex parte Quirin*, 317 U.S. 1, 25 (1942), held that "neither the Proclamation nor the fact that [the defendants] are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States . . . forbid their trial by military commission." The Court declined to hold that enemy aliens lack the ability to file habeas petitions, even though Attorney General Biddle opened his argument with that claim. *Id.* at 11 (reprinting argument). Indeed, *Quirin* offered the saboteurs the same habeas rights that were extended in *Grimley*. *See id.* at 48 (concluding that "the Commission was lawfully constituted" and that "Charge I . . .

alleged an offense which the President is authorized to order tried by military commission").

Similarly, in *In re Yamashita*, 327 U.S. 1 (1946), the Court permitted a convicted enemy belligerent, a Japanese Army General, to file a habeas petition. The Court recognized the role of the federal courts under *habeas corpus* to consider "the lawful power of the commission to try the petitioner for the offense charged." *Id.* at 8. Specifically, the Court found that, absent suspension of the writ, the federal courts possessed "the duty and power to make such inquiry into the authority of the commission as may be made by *habeas corpus*." *Id.* at 9.

Hamdan is in much the same position as General *Yamashita* and the *Quirin* defendants during the Second World War. He has been designated as an "enemy combatant" but contends that the Constitution, laws, and treaties "withhold authority to proceed with the trial." *Id.* at 9. And just as in *Milligan*, *Grimley*, *Quirin*, and *Yamashita*, the writ of *habeas corpus* is the appropriate vehicle by which to test that authority.

B. *Johnson v. Eisentrager* Does Not Preclude Habeas Review of the Legality of Military Commissions

In Hamdan's case, the district court incorrectly denied access to the writ because it misread *Johnson v. Eisentrager*, 339 U.S. 763 (1950). In fact, as this Court has already held with respect to the Geneva Conventions, *Eisentrager* "does not control this case." *Hamdan*, 126 S. Ct. at 2794.

1. This Court should reach the merits of Hamdan's habeas challenge, just as it did in *Eisentrager*

Eisentrager does not stand for the proposition that courts are closed to those in Hamdan's position. On the contrary, the *Eisentrager* petitioners received a full hearing before this Court, with the Court carefully considering the substance of their claims before resolving them *on the merits*. This Court recognized as much in *Hamdan*, noting that in *Eisentrager* "[w]e rejected [petitioners' Geneva Convention] claim on the merits because the petitioners [unlike Hamdan here] had failed to identify any

prejudicial disparity 'between the Commission that tried [them] and those that would try an offending soldier of the American forces of like rank.'" 126 S. Ct. at 2793 (quoting *Eisentrager*, 339 U.S. at 790).

The *Eisentrager* Court reached the merits of the habeas challenge even though the Petitioners were nationals of an enemy nation who conceded their status as enemy combatants. In contrast, Hamdan and the Petitioners in the present case are nationals of friendly countries, who vigorously contest their designation as enemy combatants. *See Rasul v. Bush*, 542 U.S. 466, 476 (2004) (noting these two factors as effectively distinguishing Guantanamo detainees from the *Eisentrager* petitioners). Since the Court reached the merits on a challenge to military commissions by conceded enemy combatants in *Eisentrager*, that case cannot stand for the proposition that the federal courts cannot do the same in the easier case of alien nationals of friendly nations who challenge their designation and eligibility for trial by military commission.

While *Eisentrager* did discuss at length whether enemy aliens were afforded access to American courts, it stated that "the doors of our courts have not been summarily closed upon these prisoners" and that it heard and considered "all contentions they have seen fit to advance" before concluding that no basis for issuing the writ appeared. 339 U.S. at 780, 781. Indeed, *Eisentrager* engaged in precisely the same habeas inquiry into the jurisdiction of the military commission that the Court had previously provided in *Quirin*, *Yamashita*, and *Duncan v. Kahanamoku*, 327 U.S. 304 (1946). That inquiry focused on "the lawful power of the commission to try the petitioner for the offense charged." 339 U.S. at 787 (quoting *Yamashita*, 327 U.S. at 8).

In reaching the merits of the habeas challenge, the *Eisentrager* Court recognized that—as in *Quirin* and *Yamashita*—it had jurisdiction to consider whether the petitioners had been charged with an offense cognizable as a war crime. 339 U.S. at 787 (concluding that the charges had "a basis in conventional and long-established law"). That is not the case here; in fact, a plurality of this Court determined that the previous "conspiracy"

charge was *not* a violation of the laws of war. *Hamdan*, 126 S. Ct. at 2785-86. Reliance on *Eisentrager* to deny habeas review is misplaced where no court has had the opportunity to pass on that fundamental jurisdictional question.

Moreover, *Eisentrager* did not need to address the underlying question of the legality of the World War II military commissions because those questions had already been decided in *Quirin* and *Yamashita*. 339 U.S. at 786 ("[W]e have held in the *Quirin* and *Yamashita* cases . . . that the Military Commission is a lawful tribunal to adjudge enemy offenses against the laws of war."). The petitioners in *Eisentrager* thus had no claim that the commission itself was illegitimate. Here, the prior military commission established to try Hamdan (which is identical in many material respects to the commission he faces now) was deemed *unlawful* by this Court only a year ago. *Rasul* observed that the *Eisentrager* petitioners had "been afforded access to [a] tribunal," a factor that weighed against the extension of habeas in that case. *Rasul*, 542 U.S. at 476. It is inconceivable to think that subjection to an unprecedented and unlawful tribunal could satisfy this criterion.

2. The territorial limits of *Eisentrager* do not apply here

The district court erroneously believed that *Eisentrager* compelled dismissal of habeas petitions filed from prisoners held outside the "sovereign realm" of the United States. But Hamdan's case falls squarely within the geographic scope of constitutional habeas, which historically had an "'extraordinary territorial ambit.'" *Rasul*, 542 U.S. at 482 n.12 (quoting Robert J. Sharpe, *The Law of Habeas Corpus* 188-89 (2d ed. 1989)). In the eighteenth century, habeas was recognized to extend beyond the Kingdom of England; it was "a writ of such a sovereign and transcendent authority, that no privilege of person or place can stand against it. It runs, at the common law, to all dominions held of the Crown. It is accommodated to all persons and places." *Opinion on the Writ of Habeas Corpus*, 97 Eng. Rep. 29, 36 (H.L. 1758). Indeed, Lord Mansfield stated there was "no doubt" the writ could issue in any territory "under the subjection of the Crown," even if that territory was "no part of the realm." *King v.*

Cowle, 97 Eng. Rep. 587, 598 (K.B. 1759). The writ even extended to India well before Britain's 1813 assertion of sovereignty.[4] In short, habeas jurisdiction has always turned on de facto control, not the formalistic notions of sovereignty adopted by the circuit and district courts here for the first time.[5]

As this Court recognized in *Rasul* and *Hamdan*, *Eisentrager* presented a unique factual situation, and its holding does not govern here. The *Eisentrager* petitioners were German nationals convicted by a military commission in China. The commission was established with the consent of the Chinese Government.[6] Following their convictions, the petitioners were detained at Landsberg Prison in occupied Germany, where the United States shared jurisdiction over detentions with the other Allies.[7] Based on this relatively dense legal landscape, the Government claimed in *Eisentrager* that "[t]he rights of these enemy aliens all flow from and must be vindicated within the framework of the system established for the occupation of their country . . . . They are foreigners in a foreign land, held in that foreign land by the sovereignty now governing it as a result of war, defeat, surrender, and occupation . . . . [Their] legal status does not differ from that

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[4] By 1775, judges began to issue common-law habeas writs to British subjects as well as "natives." *E.g.*, N. Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* 81 (2003); B.N. Pandey, *The Introduction of English Law into India* 151 (1967).

[5] For instances in which the writ issued from a court in England to locations outside the realm but under the control of the Crown, *see King v. Salmon*, 84 Eng. Rep. 282 (K.B. 1669) (writ issued to Channel Island of Jersey on behalf of individual committed on "suspicion of treason"); *King v. Overton*, 82 Eng. Rep. 1173 (K.B. 1668) (writ issued to Jersey); Sir Matthew Hale, *The History of the Common Law of England* 120 (1739) (writ issued to Channel Islands); *see also Bourn's Case*, 79 Eng. Rep. 465, 466 (K.B. 1619) (writ issued to Calais); M. Bacon, *A New Abridgement of the Law*, Tit. *Habeas Corpus* (B) (7th ed. 1832) (same).

[6] *Eisentrager*, Index to Pleadings, Ex. 4—Message of 6 July, 1946 to Gen. Wedemeyer from Joint Chiefs of Staff. J.A. 167.

[7] *See Basic Principles for Merger of the Three Western German Zones of Occupation and Creation of an Allied High Commission, reprinted in Documents on Germany*, 1944-1970, Comm. on Foreign Relations, 92nd Cong. (Comm. Print 1971), at 150-51.

of Germans now detained in Germany by German authorities. Like such prisoners, or like Englishmen in England, or Frenchmen in France, they must look to the rights and remedies open to them under their country's present laws and government," not the American Constitution. U.S. Br., *Johnson v. Eisentrager*, 1950 WL 78514, at *65-67 (1950) (No. 306).

In contrast, Guantanamo is "territory over which the United States exercises plenary and exclusive jurisdiction." *Rasul*, 542 U.S. at 475. It is "in every practical respect a United States territory." *Id.* at 487 (Kennedy, J., concurring). There is neither shared control by multiple sovereigns, nor an underlying legal framework apart from the Constitution. Guantanamo in 2007 is not remotely analogous to occupied Germany in 1947, and the arguments counseling denial of the writ in *Eisentrager*—unwillingness to interfere with the multiple sovereigns and the textured, distinctive legal system present in occupied Germany—are absent in the unique case of Guantanamo.

Moreover, for years the Government has held individuals such as Hamdan not only within the territorial jurisdiction of the United States, but actually within what this Court deemed the statutory jurisdiction of the *federal courts*. *Compare Eisentrager*, 339 U.S. at 768 (emphasizing that the "alien enemy . . . in no stage of his captivity[] has been within its territorial jurisdiction"), *with Rasul*, 542 U.S. at 475-84 (holding that habeas jurisdiction extended to Guantanamo). The Government continued to hold Hamdan and others facing commission trial at Guantanamo for years after *Rasul*. Textually, there was nothing to "suspen[d]" in *Eisentrager*, as the Court found that the writ had never protected the petitioners. Here, by contrast, this Court has already found that the writ protects Hamdan and others similarly situated.

3. The *Eisentrager* petitioners did not even raise the claim at issue in this case

Eisentrager does not actually implicate the challenges brought by either Hamdan or the *Boumediene* Petitioners, namely, their claims under 28 U.S.C. § 2241(c)(3) and constitutional habeas that they are held and set to be tried in violation of the Constitution, treaties, and laws of the United States. *Eisentrager*'s

counsel oddly asserted only one type of habeas jurisdiction, that for "being a citizen of a foreign state . . . in custody for an act done or omitted under any alleged . . . order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations." 28 U.S.C. § 2241(c)(4); *see also* Br. for Respondent at 2, *Johnson v. Eisentrager*, 339 U.S. 763 (reprinting statute involved and only reprinting (a) and (c)(4)); *id.* at 24-26 (making argument based solely on (c)(4)). Eisentrager thus stood in a different position from General Yamashita, for Yamashita asserted a (c)(3) claim, namely that his trial violated the Constitution, treaties, and laws of the United States.

As such, *Eisentrager* could not benefit from, and this Court did not confront the possible tension with, *Yamashita*'s foundational claim. Nor could it confront the tension with the bedrock claim of *Ex parte McCardle*, 73 U.S. (6 Wall.) 318, 325-26 (1867), where this Court observed that the *habeas corpus* statute "is of the most comprehensive character. It brings within the *habeas corpus* jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or law. It is impossible to widen this jurisdiction." *Eisentrager*'s tactical decision to assert only jurisdiction predicated on "the law of nations" may have led this Court to analogize his claim to private-law disputes from the war of 1812. *See Eisentrager*, 339 U.S. 776-77.

The strategic choice by *Eisentrager*'s counsel to place all his eggs in one jurisdictional basket cannot bind later individuals who seek to pursue other avenues for jurisdiction, particularly claims that a person "is in custody under or by color of the authority of the United States or is committed for trial before some court thereof," 28 U.S.C. § 2241(c)(1); *or* "is in custody in violation of the Constitution or laws or *treaties* of the United States," *id.* § 2241(c)(3) (emphasis added); *or* "[i]t is necessary to bring him into court to testify or for trial," *id.* § 2241(c)(5). While some of the dicta in *Eisentrager* appear to reach more than (c)(4), the Court in that case had absolutely no occasion to revisit, question, or even consider the other possibilities for jurisdiction that were at

issue in *Yamashita* and earlier cases.[8] The claims today go to the heart of constitutional law, and cannot be analogized to 190-year-old private-law disputes in New York state courts.

For each of the above reasons, "nothing in *Eisentrager* . . . categorically excludes aliens detained in military custody outside the United States from the 'privilege of litigation' in U.S. courts." *Rasul*, 542 U.S. at 484 (citation omitted).[9]

C. Those Facing Commissions Must Have the Ability To Challenge the Trials' Legality on a Pre-Trial Basis

Hamdan's petition invokes the fundamental right to challenge his military commission before he is subjected to an unlawful trial. This Court has recognized the necessity of a pre-trial habeas challenge to military trials in Hamdan's very case, over the

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[8] The Court has stated that doubts about military jurisdiction should be resolved in favor of civilian jurisdiction. *See United States ex rel Toth v. Quarles*, 350 U.S. 11, 15 (1955) ("There is a compelling reason for construing the clause this way: any expansion of court-martial jurisdiction like that in the 1950 Act necessarily encroaches on the jurisdiction of federal courts set up under Article III of the Constitution where persons on trial are surrounded with more constitutional safeguards than in military tribunals."); *see also Ex Parte Yerger*, 75 U.S. (8 Wall.) 85, 102 (1868) ("the general spirit and genius of our institutions has tended to the widening and enlarging of the *habeas corpus* jurisdiction"); *Price v. Johnston*, 334 U.S. 266, 283 (1948) ("[T]he writ of *habeas corpus* should be left sufficiently elastic so that a court may, in the exercise of its proper jurisdiction, deal effectively with any and all forms of illegal restraint. The rigidity which is appropriate to ordinary jurisdictional doctrines has not been applied to this writ."), *overruled on other grounds by McCleskey v. Zant*, 499 U.S. 467 (1991).

[9] The *Hamdan* district court relied on the fact that, in *Eisentrager*, it was immaterial whether the petitioners were in the service of a German civilian or military institution. But that was because the petitioners were *indisputably German nationals*, 339 U.S. at 765, and that status alone rendered them enemies as a matter of law, *id.* at 773-75 & n.6. In addition, *Eisentrager* emphasized that "these prisoners were actual enemies, active in the hostile service of an enemy power. There is no fiction about their enmity." *Id.* at 778. By contrast, Hamdan is a citizen of Yemen, a nation not at war with the United States, and he does not share the presumptive enemy affiliation of the *Eisentrager* petitioners. *Boumediene*, App. 95a ("These detainees are citizens of friendly nations . . . [including] Yemen[.]") (Rogers, J., dissenting).

Government's objection that the military commission Hamdan faced was solidly grounded in precedent from World War II. *Hamdan* held that "abstention is not appropriate in cases in which individuals raise 'substantial arguments denying the right of the military to try them at all.'" 126 S. Ct. at 2770 n.16; *Schlesinger v. Councilman*, 420 U.S. 738, 759 (1975) (same). Given the unprecedented nature of the commissions under the MCA, today's commission defendants continue to have a "compelling interest in knowing in advance whether [they] may be tried by a military commission that arguably is without any basis in law." *Hamdan*, 126 S. Ct. at 2772.

Hamdan is just the most recent of this Court's important precedents recognizing the right of those facing trial by military commissions to raise pre-trial habeas challenges to the legality of those commissions. In *Quirin*, this Court evaluated the legality of a military commission pre-trial because "the public interest required that we consider and decide those questions without any avoidable delay." 317 U.S. at 19. And over a century prior, the Court countenanced pre-trial challenges to the jurisdiction of both civilian and military trials in foundational cases. *E.g.*, *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807) (undertaking a pre-trial habeas review of defendants' claims and stating they could not be tried for certain substantive offenses); *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1868) (entertaining pre-trial habeas challenge to the jurisdiction of military commission). Such pre-trial challenges are wholly consistent with the Great Writ's function as a means to test the jurisdiction of a court purporting to hold and try a defendant. *See, e.g.*, *In re Mayfield*, 141 U.S. 107, 116 (1891); *Ex parte Yarbrough*, 110 U.S. 651, 653 (1884).[10]

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[10] The necessity of pre-trial habeas review is not undermined by the fact that Congress has now authorized the military commissions in the MCA, *see* MCA § 3, and provided for exclusive appellate review in the D.C. Circuit, *see* 10 U.S.C. § 950g. As the Court recognized in *Councilman*, exhaustion of remedies in the military system is not required—even where Congress makes civilian appellate review ultimately available—before allowing habeas relief. *Councilman*, 420 U.S. at 759 (citing *United States ex rel. Toth*, 350 U.S. 11 (1955); *Reid v. Covert*, 354 U.S. 1 (1957); *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960)). In *Toth*, *Reid*, and *McElroy*, the habeas

Hamdan has challenged the jurisdiction of the commission, its rules and procedures, and the legality of the particular substantive offenses for which he will be tried. *See Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9 (D.D.C. 2006). And without an opportunity to raise these challenges to the commissions on a pre-trial basis, he will be irreparably harmed. Without knowing in advance whether the commission has jurisdiction over him, what evidence it may consider, and for which offenses he may be tried, he or any other defendant will be unable to develop an effective defense strategy.[11]

Moreover, requiring a defendant to submit to a procedure that he contends is unlawful causes him "a significant and irreparable injury." *Rafeedie v. INS.*, 880 F.2d 506, 517-18 (D.C. Cir. 1989). Specifically, if a defendant participates in a proceeding that is found unlawful, the Government will "know his defense in advance of any subsequent . . . proceeding," *id.* at 517, whether it be a lawfully convened military commission or a civilian criminal trial. But if a defendant, in order not to prejudice himself in a later proceeding, "does not present his factual defense . . . he risks forsaking his only opportunity," *id.*

Finally, denying defendants a pre-trial challenge to the legality of their commissions would do away with another core habeas protection. At common law, "habeas incorporated a

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petitioners contended that Congress had no constitutional power to subject them to the jurisdiction of military tribunals. *Id.* The fact that Congress had provided for appellate review by an Article III court did not preclude the Court from holding in those cases that it was inappropriate to require exhaustion of the military trial process before entertaining habeas challenges.

[11] The Government clearly understands the strategic litigation importance of certainty in advance of trial. Indeed, the Government asked Congress to place within the MCA a pretrial right for interlocutory review when it loses—even if it loses a mere *evidentiary* question. During the MCA drafting, the Government requested, and Congress gave it, the right to take an interlocutory appeal any time there is an adverse ruling that "terminates proceedings of the military commission with respect to a charge or specification" or "excludes evidence that is substantial proof of a fact material in the proceeding." MCA § 3(a), 10 U.S.C. § 950d(a)). Yet it is unclear whether the MCA affords the defendant a comparable ability to challenge adverse rulings on these issues.

speedy-trial guarantee," *Boumediene*, 476 F.3d at 1006 n.9 (Rogers, J., dissenting) (citing cases), that the MCA explicitly eliminates in commission proceedings. *See* MCA § 3(a) (codified at 10 U.S.C. § 948b(d)(1)(A)) (providing that "any rule of courts-martial relating to speedy trial' 'shall not apply to trial by military commission"). Without the ability to file a pre-trial habeas petition, defendants facing military trial would have no way to obtain swift justice.

III. This Court Has Already Decided in *Hamdan* That the Detainees at Guantanamo May Vindicate Structural Constitutional Guarantees

The Government has characterized this Court's decision in *Hamdan v. Rumsfeld* as a statutory decision. *See, e.g.*, U.S. Br. Opp. Cert., *Boumediene v. Bush*, No. 06-1196, at 5. While there is some truth to that description, *Hamdan* makes clear that the Government and the panel below have overread the *Eisentrager* decision in finding that the detainees can assert *no* constitutional protections whatsoever.

Although *Hamdan* certainly held that the President's initial scheme for military commissions violated the Uniform Code of Military Justice, *see Hamdan*, 126 S. Ct. at 2759, *Hamdan*'s entire framework is built around the constitutional axiom of separation of powers. If the Government was correct in its claim that Guantanamo detainees could assert no constitutional protections, Mr. Hamdan could not have prevailed before this Court. Mr. Hamdan asserted a *constitutional* conflict between the President's Military Order and congressional statutes. This Court did not resolve that conflict by deeming it irrelevant or somehow accepting the Government's claim that *Eisentrager* barred detainees from asserting structural principles. Rather, it inquired into the constitutional separation of powers issue and explicitly found that in a conflict between the Congress and the President in this arena, Congress prevails. *Hamdan*, 126 S. Ct. at 2774 n.23.

That is to say, *Hamdan* is grounded in a constitutional principle, one available for detainees to vindicate. If a Guantanamo detainee lacked the ability to assert a structural violation of the Constitution, the President would have been able

to do whatever he wanted in his Military Order without this Court's interference in *Hamdan*. But the Court properly rejected such bold arguments, and instead found that Hamdan, a detainee at Guantanamo, was able to raise the constitutional structural conflict between the President's Order and Congress' statutes.

This point is particularly relevant in the present case, for just as constitutional principles of separation of powers served to limit the President's power in *Hamdan*, the Suspension Clause serves as a structural constitutional "limit on Congress's powers" to strip the courts of jurisdiction over these habeas cases. *See Boumediene*, 476 F.3d at 998 (Rogers, J., dissenting). Accordingly, Congress may not strip this Court of jurisdiction unless it acts "pursuant to the powers it derives from the Constitution," *id.* at 995, in the same way that in *Hamdan*, the President could not order military trials unless he acted pursuant to powers he derived from Congress and the Constitution.

IV. The Court of Appeals' Decision Disregards this Court's Fundamental Rights Jurisprudence

The court of appeals' decision in *Boumediene* further erred by summarily dismissing the "fundamental rights" jurisprudence of this Court and the Petitioners' efforts to invoke those rights. In the "most significant"[12] of *The Insular Cases*, *Downes v. Bidwell*, this Court identified certain rights that were "indispensable to a free government," distinguishing them from less essential protections that, while provided for in the Constitution, do not necessarily apply in all circumstances when the Government acts outside the United States. *Downes v. Bidwell*, 182 U.S. 244, 282-83 (1901). In elaborating on the distinction between constitutional prohibitions in effect only in the United States and those that operate "irrespective of time or place," the Court made clear that certain types of legislation are simply outside the powers of Congress, regardless of location. *Id.* at 276-77; *see also Dorr v. United States*, 195 U.S. 138, 146 (1904); *Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922) (reaffirming "fundamental rights"

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[12] *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 601 (1976).

jurisprudence). Indeed, in *Flores*, this Court summarized the key holdings of *The Insular Cases*, noting that even in territories where admission to the Union was not anticipated, "'fundamental' constitutional rights were guaranteed to the inhabitants." 426 U.S. at 601 n.30.

Despite this long history of protecting fundamental rights in territory under U.S. control, the court of appeals in this case summarily and erroneously rejected the guidance of *The Insular Cases*. The panel distinguished those cases by saying that they related only to "Territory or other Property belonging to the United States." *Boumediene*, 476 F.3d at 992.

This reasoning is grossly flawed, and provides no basis for the sweeping assertion that no constitutional rights, fundamental or otherwise, protect Petitioners. This Court has already rejected the claim that the lack of formal sovereignty over Guantanamo places it beyond the jurisdiction of American courts and law. *See Rasul*, 542 U.S. at 480 ("[T]he United States exercises 'complete jurisdiction and control' over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses."). Guantanamo "belongs" to the United States in every meaningful sense. As Justice Kennedy has explained, "Guantanamo Bay is in every practical respect a United States territory . . . . From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it." *Id.* at 487 (Kennedy, J., concurring). This "implied protection," if it means anything, must include protection for fundamental rights.

Rasul itself strongly suggests that the "fundamental rights" reasoning of the *Insular Cases* applies at Guantanamo. In *Rasul* the Court stated that Petitioners, held for over two years in territory subject to the exclusive jurisdiction and control of the United States, had adequately alleged a violation of the Constitution or laws or treaties of the United States necessary to support a valid habeas petition. *Id.* at 484 n.15. The Court cited to a section of Justice Kennedy's concurring opinion in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277-78 (1990), a case testing whether the Fourth Amendment applied when U.S. agents

searched the Mexican residence of a Mexican citizen. That section of Justice Kennedy's opinion began with the proposition that "the Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic." *Id.* at 277. It then analyzed the facts of *Verdugo* in light of the "fundamental rights" jurisprudence of *The Insular Cases*. *Id.* at 278 (Kennedy, J., concurring).[13] Justice Kennedy's focus on due process in *Verdugo* drew heavily on Justice Harlan's analysis of *The Insular Cases*, noting that "'the question of which specific safeguards . . . are appropriately to be applied in a particular context . . . can be reduced to the issue of what process is 'due' a defendant in the particular circumstances of a particular case.'" *Id.* (Kennedy, J., concurring) (quoting *Reid*, 354 U.S. at 75 (Harlan, J., concurring); *see also id.* at 277 ("'The proposition is, of course, not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not necessarily apply in all circumstances in every foreign place.'") (quoting *Reid*, 354 U.S. at 74 (Harlan, J., concurring)).

Thus, at a minimum, some "safeguards" are due to criminal defendants in American courts as a matter of fundamental constitutional right, regardless of the location of the trial or the

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[13] *Verdugo-Urquidez* does not purport to hold that the Constitution *always* is inapplicable to non-nationals overseas. Although the Court held in that case that the Fourth Amendment did not apply in those circumstances, it regarded as established that certain "'fundamental' constitutional rights are guaranteed to inhabitants of . . . territories" under the control of the United States. *Id.* at 268. The Court emphasized the limited and highly contextual nature of its decision, which carefully examined the history of the Fourth Amendment. *Id.* The degree to which the Constitution applies extraterritorially is complex and dependent on many factors, including the particular provision, the status of the individual claiming its protection, and the territory in question. *See, e.g.*, *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Ocampo v. United States*, 234 U.S. 91 (1914); *Verdugo-Urquidez*, 494 U.S. at 277 (Kennedy, J., concurring) (explaining that the question is not whether the Constitution applies, as it must, but "what constitutional standards apply when the Government acts, in reference to an alien, within its sphere of foreign operations"). *Verdugo-Urquidez*, moreover, reserved the question whether a person whose "lawful but involuntary" stay was prolonged "by a prison sentence" might be entitled to constitutional protections. 494 U.S. at 271-72.

status of the defendant. But if the court of appeals' decision in *Boumediene* is affirmed without modification, the minimal protections afforded by this Court's fundamental rights jurisprudence will be nullified, and criminal defendants in the military commissions set up under the MCA will be totally subject to the whims of Congress and the tribunals in those proceedings. While the full scope of such protection need not be articulated in this case (which, after all, involves *detention* rather than *criminal prosecution*), it is imperative that the Court not affirm the court of appeals' decision in a manner that strips criminal defendants of the ability to invoke fundamental constitutional rights in their defense.

Instead, the Court should use this case to reaffirm the fundamental rights jurisprudence regarding those minimal constitutional protections afforded to criminal defendants in all American courts. Among these protections are the following:

(1) the Constitution's most fundamental right—the right to *habeas corpus*. *See Carafas v. LaVallee*, 391 U.S. 234, 238 (1968) (habeas is "shaped to guarantee the most fundamental of all rights"); *see also Downes*, 182 U.S. at 282 (identifying "free access to courts" as one of the "natural rights enforced in the Constitution"). Without access to the courts via habeas, defendants lack the ability to protect their fundamental rights.

(2) a guarantee of due process of law, *see Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 668 n.5 (1974) ("there cannot exist under the American flag any governmental authority untrammeled by the requirements of due process of law") (internal quotation marks and citation omitted), including, among other things, the right to be tried before an impartial and independent court, *see Hamdi*, 542 U.S. at 535 (identifying the right to be heard by "an impartial adjudicator" as one aspect of the process due to an enemy combatant), and the right to confront one's accusers, *see Crawford v. Washington*, 541 U.S. 36, 49 (2004) ("It is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty

to cross examine") (internal quotation marks and citation omitted); *see also Hamdan*, 126 S. Ct. at 2798 (plurality) (citing cases).[14]

(3) the right to not be tried on *ex post facto* charges, *see Downes*, 182 U.S. at 277 (suggesting that the Ex Post Facto Clause applies "irrespective of time or place," as it goes to "the competency of Congress to pass a bill of that description") (emphasis omitted); and

(4) protection against the use of evidence extracted by torture or coercion, *see Miller v. Fenton*, 474 U.S. 104, 109 (1985) (abusive interrogation techniques "are so offensive to a civilized system of justice that they must be condemned"); *Rochin v. California*, 342 U.S. 165, 173-74 (1952) (coerced confessions gravely "offend the community's sense of fair play and decency. . . . [T]o sanction [such] brutal conduct . . . would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society.").[15] Such evidence is not only inherently unreliable, *see, e.g.*, *Jackson v. Denno*, 378 U.S. 368, 385-86 (1964), but its admission necessarily corrupts the judicial process and violates fundamental constitutional and human rights.

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[14] The MCA offends fundamental confrontation principles by reversing the longstanding presumption against admitting hearsay evidence, and placing on the party opposing its admission (typically the defendant) the burden of proving its unreliability. As a practical matter, it then makes it virtually impossible for defendants to prove unreliability by protecting from disclosure any sensitive sources and methods used by the Government to obtain the hearsay evidence. MCA § 3 (adding 10 U.S.C. §§ 949a(b)(2), 949d(f)).

[15] Long before the drafting of the U.S. Constitution, the common law unequivocally condemned torture and banned judicial reliance on coerced testimony. *See, e.g.*, *A. v. Secretary of State*, [2005] UKHL 71, ¶ 11, ¶ 51 (appeal taken from Eng.) ("[T]he English common law has regarded torture and its fruits with abhorrence for over 500 years."). But in this case, the Executive Branch has maintained that it was not "the CSRT's role" to investigate allegations of torture, and it was permissible for CSRTs to rely on evidence "obtained through a non-traditional means, even torture" to make status determinations. Tr. 12/2/04 oral argument at 83-87, *Boumediene v. Bush*, Civ. No. 04-1166 (RJL) (D.D.C.). Likewise, the MCA would allow testimony obtained through "coercion" to be introduced into evidence at a commission trial. *See* MCA § 3 (adding 10 U.S.C. § 948r).

This is by no means an exhaustive list; rather, it merely illustrates some fundamental rights that the court of appeals swept aside in its overbroad and erroneous ruling in this case. This Court should not ratify that result, as to do so would leave criminal defendants before commissions without protection in a process that raises serious constitutional questions. Instead, the Court should resolve this case in a manner that ensures that the commissions do not transgress the Constitution's limitations on the exercise of power at the expense of fundamental rights.

Such a ruling would be solidly grounded in precedent, as this Court has noted the limitations imposed by the Constitution on such tribunals. *Quirin*, 317 U.S. at 29 ("We must therefore first inquire whether any of the acts charged is an offense against the law of war cognizable before a military tribunal, and if so whether the Constitution prohibits the trial."). Neither of the prerequisites identified in *Quirin* has been satisfied with respect to the *Amicus* here, as the acts with which he has been charged ("Conspiracy" and "Providing Material Support for Terrorism")[16] are not offenses under the law of war and his trial on these charges is prohibited by the Ex Post Facto Clause. Hamdan's right to assert these defenses, and this Court's power to protect fundamental rights wherever the authority of the United States is being exercised, must be preserved.

V. The MCA Provides Neither an Adequate Nor an Effective Habeas Substitute

Absent suspension of the Great Writ, Congress may only eliminate federal jurisdiction over constitutional habeas claims if it provides a substitute "which is neither inadequate nor ineffective to test the legality" of the executive action. *Swain v. Pressley*, 430 U.S. 372, 381 (1977). In Petitioners' case, this will require an inquiry into whether DTA section 1005(e)(2)'s provision for review of CSRT decisions in the D.C. Circuit is such a substitute. Military commission challenges, however, will require a wholly distinct inquiry into whether MCA section 3's very different

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[16] *See* Hamdan's Pet. for Writ of Cert. Before J., filed in *Hamdan v. Gates*, S. Ct. Case No. 07-15, at 4.

provision for limited review of final commission determinations in the D.C. Circuit can act as an adequate substitute. Whatever the answer to the "adequate and effective" inquiry with respect to Petitioners, the MCA falls far short of this standard with respect to the claims of defendants challenging trial by military commission.[17] To the extent this Court concludes that the DTA

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[17] The MCA's convoluted provisions leave some doubt as to whether defendants in military commissions have any recourse at all to the federal courts. Under the 2005 DTA, section 1005(e)(3) provided for limited review of decisions of military commissions. But MCA section 3 explicitly states that "[e]xcept as otherwise provided *in this chapter* and *notwithstanding any other provision of law* (including section 2241 of title 28 or any other *habeas corpus* provision), no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever . . . relating to the prosecution, trial, or judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter." MCA § 3(a), 10 U.S.C. § 950j(b)) (emphasis added). Since DTA section 1005(e)(3) is codified in Chapter 47 of Title 10 as opposed to Chapter 47A (where the MCA is codified), the MCA explicitly shuts off any recourse to the commission review procedures in DTA section 1005(e)(3). *See* MCA § 3(a)(1) ("Subtitle A of title 10, United States Code, is amended by inserting after chapter 47 the following new chapter: Chapter 47A-Military Commissions").

Elsewhere in MCA section 3(a), Congress vested the D.C. Circuit with "exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission." 10 U.S.C. § 950g(a). Another section of the MCA, however, states that "[e]xcept as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider any other action . . . relating to any aspect of the . . . trial . . . of an alien" detained as an enemy combatant. MCA § 7(a). This latter provision seems to nullify the review provisions added in section 3(a), defining the DTA's already invalidated commission review procedures as the only available recourse.

Thus, one could fairly read the MCA as providing *no* valid provision at all for review of military commissions by an Article III court. On the one hand, the provisions of DTA section 1005(e)(3) are inapplicable because they appear in a different chapter of the U.S. Code than the MCA and the latter specifically denies any provision outside its own chapter from being available to challenge the trial of detainees. On the other hand, the MCA's own provisions for review of commission decisions appearing in section 3(a) would seem to be inapplicable by virtue of section 7(a)'s mandate that only DTA section 1005(e)(3) can be used to challenge any aspect of the trial of a detainee. This

provides an adequate substitute for habeas review of CSRT decisions, *Amicus* Hamdan asks that it issue a narrow decision that does not extend to the very different provisions governing review of military commissions.

The MCA purports to prohibit federal courts from considering the issue at the heart of the Great Writ and of Hamdan's legal challenge: whether the military commissions are lawfully constituted and have jurisdiction to try and punish Hamdan and other defendants. *See Ludecke v. Watkins*, 335 U.S. 160, 162 (1948). Instead, the MCA apparently restricts the reviewing court's inquiry to the issue of "whether the final decision [of the commission] was consistent with the standards and procedures" set forth by the Act. MCA § 3(a), 10 U.S.C. § 950g(c)(1). That is, the judicial review provided for by the MCA—the supposed habeas substitute—consists only of considering whether the commission followed the assertedly unlawful procedures in the statute. Defendants are seemingly denied the ability under the MCA to claim that the military commission's "standards and procedures" are themselves impermissible.[18] And this statutory scheme itself gives the

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result would defy the Constitution's requirement that to remove habeas jurisdiction Congress must provide petitioners an adequate and effective substitute. Despite this statutory abyss, for the remainder of this brief Hamdan assumes for the sake of argument that MCA section 3(a)'s review provisions are available following the final decision of a military commission.

[18] MCA section 3 also states that the D.C. Circuit's jurisdiction "shall be limited to the consideration of . . . (2) to the extent applicable, the Constitution and the laws of the United States." MCA § 3(a) (codified at 10 U.S.C. 950g(c)(2)). To the extent this cryptic provision allows federal courts any recourse at all to the Constitution and laws of the United States, it does not specify whether courts may evaluate the commission's procedures and standards against those laws or whether they may consider only the commission's final decision in a particular case.

Moreover, the MCA seemingly precludes the federal courts from considering a defendant's treaty claims. MCA § 3(a), 10 U.S.C. § 950g(c), § 948b(g). Under common law habeas, in contrast, courts must consider and vindicate treaty-based rights. *See, e.g., Mali v. Keeper of the Common Jail*, 120 U.S. 1, 17-18 (1887). Although Congress is free to abrogate treaties entirely, it must do so with a clear statement; otherwise, courts must interpret federal law as being consistent with

Government the keys to the federal courthouse; by not finalizing a decision (or by delaying prosecution) it can block judicial review forever.[19]

The MCA's failure to provide petitioners with any opportunity to test the legality of the commission's procedures stands in marked contrast to the scope of review the DTA prescribes for CSRTs. The DTA requires a federal court to make the inquiry into CSRTs that the MCA forbids for military commissions: "whether the use of [the CSRT] standards and procedures . . . is consistent with the Constitution and laws of the United States." DTA § 1005(e)(2)(C)(ii).[20]

In addition, while the MCA prohibits review of factual matters in challenges to commissions, the DTA requires it for challenges to CSRTs. *Compare* MCA § 3(a) (codified at 10 U.S.C. § 950g(b) (providing that in a review of a military commission, "the Court of Appeals may act only with respect to matters of law") *with* DTA § 1005(e)(2)(C)(i) (requiring, with respect to CSRTs, that the D.C. Circuit ensure "that the conclusion of the Tribunal be supported by a preponderance of the evidence"). This DTA provision requiring at least some minimal factual review of CSRTs has led the D.C. Circuit to announce orders governing the evidentiary and procedural rules of the tribunals. *See Bismullah v. Gates*, No. 06-1387, slip op. at 13 (D.C. Cir. 2007) ("[T]he DTA

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international law obligations. *Cook v. United States*, 288 U.S. 102, 120 (1933); *see also Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). The MCA does not constitute any such clear statement—on the contrary, it purports to uphold the Geneva Conventions, *see* MCA § 6; *id.* § 3 (codified at 10 U.S.C. § 948b(f))—and defendants therefore retain their treaty rights but lack a forum in which to vindicate them.

[19] As explained above, because the MCA does away with traditional guarantees of a speedy trial, the Government may delay a commission trial indefinitely at any point, preventing a "final" judgment or decision, and thereby immunizing the military commissions from any judicial scrutiny.

[20] DTA section 1005(e)(3) which, as explained above, section 3(a) of the MCA renders inapplicable to defendants, did permit the D.C. Circuit to make a similar inquiry for military commissions. *See* DTA § 1005(e)(3)(D)(ii). *But see* MCA § 3(a) (codified at 10 U.S.C. § 950j) (eliminating recourse to the DTA review procedures); *supra* note 17.

directs this court to 'determine the validity' of a Tribunal's 'status determination' . . . with particular reference to 'the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence.'"). Because the MCA forbids the D.C. Circuit to even consider factual issues regarding military commissions, it will be unable to issue orders for those commissions of the kind issued in *Bismullah* for review of CSRT determinations.

The MCA's prohibition on any judicial challenge to factual or evidentiary matters is particularly unacceptable as a habeas substitute because the MCA allows a defendant to be convicted and punished based on evidence obtained through use of "cruel, inhuman, or degrading treatment"—so long as the interrogation occurred before passage of the DTA on December 30, 2005. *See* MCA § 3 (codified at 10 U.S.C. § 948r) (prohibiting the use of such evidence obtained after passage of the DTA, and so implicitly inviting its use if obtained before that date). Because evidence "procured by coercion is notoriously unreliable and unspeakably inhumane," *Boumediene*, 476 F.3d at 1006 (Rogers, J., dissenting), "the English common law has regarded torture and its fruits with abhorrence for over 500 years," *A. v. Sec'y of State*, [2006] 2 A.C. 221 ¶ 51 (H.L.) (appeal taken from Eng.) (Bingham, L.). Accordingly, a proceeding that welcomes evidence obtained through "cruel, inhuman, or degrading" methods and immunizes such evidence from the scrutiny of Article III judges is no substitute for the writ of *habeas corpus*.

The Great Writ has long distinguished between persons convicted by civilian criminal courts of general jurisdiction, and those tried by the military or executive. As Chief Justice Marshall explained, on habeas review a judgment from a military tribunal – an "inferior court[] of limited jurisdiction" – is "not placed on the same high ground with the judgments of a court of record" such as a civilian court. *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 209 (1830).[21] Because habeas is at its zenith when challenging the

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[21] At common law, "[t]he judgments or orders of these tribunals of special and limited jurisdiction did not carry the same presumption of validity as the judgments of a superior court [i.e. a court of general jurisdiction]." Gerald L.

validity of these inferior courts, any adequate substitute must allow a full opportunity to challenge the legal and factual basis of the detention and trial. The MCA provides defendants before military commissions with neither, and so is inherently inadequate and ineffective as a habeas replacement.

Amicus believes the DTA's procedures are also an inadequate substitute for the Great Writ in detention cases. Regardless of how the Court decides that question, *Amicus* believes that the inquiry into whether Congress has provided an adequate substitute in *Boumediene* requires a different analysis than its military-commission counterpart. For the reasons stated above, Hamdan would prefer that this Court render a decision about whether the MCA provides an adequate substitute for habeas in commission cases following full briefing and oral argument on this specific question. However, after six years of awaiting a trial, Hamdan believes this Court should, if at all possible, resolve this question now. Indeed, in *Quirin*, this Court opted to hear the pretrial challenge to the military commission, even though the defendants had only been in captivity for a few weeks. Hamdan is about to start his seventh year of captivity. Both the nation and the international community have a deep interest in knowing what procedures the Government will employ to try those accused of being enemy combatants. It is high time to resolve this uncertainty.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below. Whether through the vehicle of Hamdan's companion Petition for Certiorari Before Judgment, or within this case itself, the Court should hold that the MCA's elimination of pre-trial *habeas corpus* to challenge a newfangled military tribunal with powers of life and death is impermissible.

Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961, 982 (1998). Because these special tribunals "might employ less protective procedures than the common law courts," *id.* at 982 n.115, habeas requires greater scrutiny of their jurisdiction and legality.

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